

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 26, 2006

STATE OF TENNESSEE v. BRENDA ARMSTRONG

Appeal from the Circuit Court for Williamson County
No. I-01035-B Russ Heldman, Judge

No. M2005-01158-CCA-R3-CD - Filed September 14, 2006

The Appellant, Brenda Armstrong, was convicted by a Williamson County jury of especially aggravated robbery, a Class A felony, and was sentenced to twenty-three years in the Department of Correction. On appeal, Armstrong raises the following issues for our review: (1) whether the evidence was sufficient to support her conviction; (2) whether the trial court abused its discretion in permitting introduction into evidence of portions of a videotaped interview of the Appellant; and (3) whether the trial court erred in sentencing. After review of the record, we affirm Armstrong's conviction and resulting sentence.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J. C. MCLIN, JJ., joined.

Trudy L. Bloodworth, Nashville, Tennessee, for the Appellant, Brenda Armstrong.

Paul G. Summers, Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Kim R. Helper, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

The victim, Cecil Maxie, was employed by a company engaged in the compaction of damaged vehicles. He explained that his employment required him to travel from city to city for days or weeks at a time, and, for this reason, he was paid by his employer in cash. On the date of the offense, the victim was working in Franklin and had been paid \$265.00 the day before. During the early morning hours of November 1, 2003, the victim decided to purchase some marijuana or crack cocaine. While walking, Maxie encountered an acquaintance, Joe Rucker, who he knew as "Rooster." "Rooster" agreed to join in the search for drugs. Shortly thereafter, a white Oldsmobile,

driven by a male and carrying a female passenger, stopped and offered the two a ride. The victim and “Rooster” first declined; however, when the car approached a second time, the two got into the Oldsmobile because “Rooster” knew the driver, Raymond Stewart, and the passenger, the Appellant. At this point, all four joined in the search for drugs. After several unsuccessful attempts to purchase drugs, “Rooster” decided to part company with the group. The victim, however, elected to remain in the backseat of the car and search further.

The trio stopped at a Mapco gas station, and Stewart asked the victim to buy a few dollars of gas. The victim removed the entire \$265 from his pocket in the presence of Stewart and paid three dollars for gas. While the victim pumped the gas, Stewart made a telephone call. The two got into the car and proceeded north on I-65 toward Nashville with Stewart driving. Soon thereafter, the victim announced that he was anxious about returning home because his boss was to pick him up in the morning. Finally, the victim asked to get out of the vehicle. The victim testified that at that point Stewart displayed a knife with a three to four inch blade and told him to hand over his money. The Appellant added, “we are serious.” The victim testified that he, “reached over [Stewart] - - after I saw they were serious, I reached over [Stewart] and tried to grab the steering wheel” in an effort to cause an accident.

Eventually, Stewart slowed down and pulled to the shoulder of the interstate, which occurred inside the city limits of Brentwood. The victim tried to exit the vehicle but was unsuccessful because the vehicle’s child safety locks had been activated. Next, he laid down in the seat and tried to kick out the windows; however, they would not break. The victim testified that Stewart then “started over the . . . seat, you know, he like wanted my money. He grabbed my pocket and I grabbed it.” The victim sat up in an effort to keep Stewart in the front seat. In the meantime, the Appellant, who remained in the passenger seat, acquired the knife from Stewart and repeatedly tried to stab the victim while Stewart attempted to take the victim’s money. The victim added, “she’s trying to turn in the seat but she only can turn so far she couldn’t turn all of the way around like so, she could only turn so far like this.” The victim explained it was difficult for the Appellant to turn around in her seat because she weighed “350 maybe 400 pounds.”¹ While struggling to push Stewart away from his wallet, the victim tried to “block the knife” to keep the Appellant from cutting his face, but he was unable to avoid being repeatedly cut. The victim sustained numerous cuts to his face, neck area, and hands. Eventually, the victim gave up because he was bleeding profusely. Stewart took the money from the victim’s pocket and opened the door. The victim rolled out of the vehicle head first onto the shoulder of the interstate. The victim testified, “they told me not to tell nobody, told me not to mention this to no one . . .” Stewart and the Appellant then drove away.

Officer Jeff Morehead with the Brentwood Police Department responded to a 911 call concerning a man lying on the interstate south of the Church Street overpass on I-65. He testified that the victim, who was lying in the emergency lane, was “in pretty bad shape. He had a lot of blood to his face, cuts, lot of blood on his hands. It appeared on first glance that he had been thrown from a moving vehicle is the first thing that popped in my head.” According to Jeff Morehead, the

¹The pre-sentence report noted the 5 foot 5 inch Appellant’s weight at 365 pounds.

victim sustained several cuts down to the bones on his fingers and several fractured fingers, in addition to cuts on his face. After he was released from Vanderbilt Medical Center, the victim was unable to work or use his right hand for two weeks.

At the hospital, the officers interviewed the victim, as did Detective David O'Neal with the Brentwood Police Department. From the information he received through interviewing the victim, O'Neal located "Rooster," whom he identified as Joe Rucker. Rucker was able to identify the Appellant from a photospread, and O'Neal obtained a warrant for the Appellant and arrested her on November 5, 2003. O'Neal also located the Oldsmobile driven by Stewart. The backseat, as well as the outside of the rear passenger door, were covered with blood matching the DNA profile of the victim. O'Neal also found the victim's eyeglasses inside the vehicle.

The Appellant and Stewart were jointly indicted by a Williamson County grand jury on January 12, 2004, for especially aggravated robbery, a Class A felony. The Appellant's trial commenced on August 25, 2004, with the jury finding the Appellant guilty as charged on August 27, 2004. A sentencing hearing was held on January 7, 2005, and the trial court sentenced the Appellant to twenty-three years as a violent offender. The Appellant filed a motion for new trial on February 4, 2005. This timely appeal followed.

Analysis

I. Sufficiency of the Evidence

The Appellant asserts that the evidence is insufficient to support her conviction for especially aggravated robbery. We apply the rule that where the sufficiency of evidence is challenged, the relevant question for the reviewing court is "whether, after viewing the evidence in the light most favorable to the [State], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 433 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); *see also* Tenn. R. App. P. 13(e). The scope of our examination of the evidence is not equivalent to that of the jury's. In a challenge to the sufficiency of the evidence, this court does not retry the defendant. We emphasize that our examination in a sufficiency review is not to revisit inconsistent, contradicting, implausible, or non-credible proof, as these issues are resolved solely by the jury. Rather, we look to the record to determine whether there was substantive probative evidence to support the verdict. The second inquiry, the question of legal sufficiency, then follows: whether the record contains evidence from which the jury could have found the essential elements of the crime beyond a reasonable doubt. Every reasonable hypothesis of innocence need not be dispelled; it is only necessary that there exists proof which supports the elements of the crime. The State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). All questions involving the credibility of witnesses, the weight and value to be given to the evidence, and all factual issues are resolved by the trier of fact. *State v. Pappas*, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). This court will not reweigh or reevaluate the evidence presented. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).

“A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

On appeal, the Appellant asserts that her actions on November 1, 2003, do not warrant a conviction for especially aggravated robbery. Robbery is defined as the intentional or knowing theft of property from the person of another by violence or putting the person in fear. T.C.A. § 39-13-401(a) (2003). Pursuant to Tennessee Code Annotated section 39-13-403(a) (2003), especially aggravated robbery, as relevant to the indictment in this case, is robbery accomplished with a deadly weapon and where the victim suffers serious bodily injury. Serious bodily injury involves: “(A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty.” T.C.A. § 39-11-106(a)(34) (2003). A deadly weapon is defined as “[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury.” *Id.* at (a)(5)(B).

The Appellant argues that the proof fails to establish that she took any of the victim’s property, that she benefitted from the robbery, or that she promoted the robbery. The Appellant’s argument is misplaced. Our law provides that “[a] person is criminally responsible as a party to an offense if the offense is committed by the person’s own conduct, by the conduct of another for which the person is criminally responsible, or by both.” T.C.A. 39-11-401(a) (2003) (emphasis added). The record indicates that the jury was properly instructed with regard to the law. Moreover, our criminal code provides that before criminal liability may result from the complicity provisions of Tennessee Code Annotated section 39-11-401, there must be proof that the accused, “[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, . . . solicits, directs, or attempts to aid another person to commit the offense” T.C.A. § 39-11-402(2) (2003) (emphasis added).

This provision affirms the basic principle that criminal liability under our penal code is based upon conduct, irrespective of whether it is the defendant’s conduct, that of another for which he or she is accountable, or both in combination, in establishing the elements of the crime charged. In the light most favorable to the State, the proof demonstrates that the Appellant assisted in the commission of the robbery by stabbing the victim numerous times, resulting in cuts to the victim’s face, neck, hands, and arms. Several of the cuts were “to the bone,” resulting in serious bodily injury. From these facts, a rational trier of fact could have found the essential elements of the crime of especially aggravated robbery beyond a reasonable doubt based upon the conduct of the Appellant, the conduct of the co-defendant Stewart, and a combination of both.

II. Redaction of Videotaped Interview

The Appellant makes a generalized argument that the method of redaction employed by the State in the introduction of a videotape of the Appellant's statement to Detective O'Neal was improper. On August 25, after the trial had begun, Appellant's counsel indicated that she would prefer the introduction of the videotaped statement to the introduction of a transcribed statement that had been redacted. The following day when the video was to be played, the State indicated that it was unable to technically redact the videotape. The trial court allowed Detective O'Neal to stop the videotape at the inadmissible portions of his testimony and fast forward to the admissible portions.

First, we would note that the videotape was introduced and played to the jury without the Appellant's objection. *See* Tenn. R. App. P. 36(a). Moreover, admissibility of the videotape is not included in the Appellant's motion for new trial. *See* Tenn. R. App. 13(b). Either of these omissions subjects the issue to waiver. Finally, the Appellant has failed to cite any authority in support of her argument as required by Tenn. R. App. P. 27(a)(7) and Tenn. Ct. Crim. App. R. 10(b). Notwithstanding potential default of the issue, the Appellant offers no evidence of prejudice by the procedure employed, nor do we find error in the admission of the Appellant's videotaped statement to the police.

III. Sentencing Decision

The Appellant asserts that the trial court erred in failing to apply mitigating considerations to her sentence as authorized by Tennessee Code Annotated section 40-35-113 (2003). Specifically, she contends that consideration of her mental health issues should have served to mitigate her sentence. *See* T.C.A. § 40-35-113(8). When an accused challenges the length, range, or manner of the service of a sentence, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The court must consider the evidence received at the trial and sentencing hearing, the pre-sentence report, the principles of sentencing, arguments of counsel, the nature and characteristics of the offense, mitigating and enhancing factors, statements made by the offender, and the potential for rehabilitation. *Ashby*, 823 S.W.2d at 168; *see also* T.C.A. § 40-35-210 (2003). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d), Sentencing Commission Comments.

The Appellant was convicted of especially aggravated robbery, a Class A felony, which carries a sentencing range of fifteen to twenty-five years. T.C.A. § 40-35-112(a)(1) (2003). The presumptive sentence for a Class A felony is the midpoint within the range unless there are enhancement or mitigating factors. T.C.A. § 40-35-210(c). The presumptive sentence is then increased for applicable enhancing factors and decreased for applicable mitigating factors. *Id.* at (e).

The Appellant asserts that her sentence should be mitigated because, in addition to being a drug addict, she was previously diagnosed with paranoid schizophrenia, suffered from auditory hallucinations, and was taking anti-psychotic medications at the time of the commission of the crime.

In support of this argument, she introduced medical records relating to continuing treatment for her condition at the sentencing hearing. The burden of proving applicable mitigating factors rests upon the Appellant. *State v. Joshua Aaron Roush*, No. E2002-00313-CCA-R3-CD (Tenn. Crim. App. at Jackson, Feb. 18, 2003). Therefore, while Tennessee Code Annotated section 40-35-113(8) allows a court to consider any mental condition that significantly reduced the Appellant's culpability, the Appellant must sufficiently establish not only the presence of a defect but also a causal connection between her ailment and the offense charged.

At the conclusion of the sentencing hearing, the trial court stated, "with regard to mitigating factors, I've considered each one of them, and I'm of the opinion that no mitigating factors exist under the proof today." We agree with the trial court that the proof does not support application of mitigating factor (8). While the record indicates that the Appellant was previously diagnosed with a mental illness, she has failed to establish how that condition significantly reduced her culpability for this offense. Review of the proof reflects that at the time of the offense, the Appellant exhibited no outward signs of dissociative behavior or cognitive impairment beyond that generally associated with criminality.

Moreover, the trial court properly enhanced the Appellant's sentence based upon her extensive criminal history. T.C.A. § 40-35-114(2) (2003). It was within the discretion of the trial court to determine the appropriate weight to be given the factor being applied. We find nothing in the record to preponderate against the trial court's determinations. The pre-sentence report reflects that the Appellant has twenty-two prior convictions, including one attempted robbery conviction, eight theft convictions, and four convictions for reckless endangerment with a deadly weapon. Thus, upon review, we conclude that a sentence of twenty-three years is justified in this case and adequately supported by the record.

CONCLUSION

Based upon the foregoing, we affirm the Appellant's judgment of conviction and resulting twenty-three year sentence.

DAVID G. HAYES, JUDGE